IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 61 of 1987

For Approval and Signature:

Hon'ble MR.JUSTICE A.R.DAVE Sd/-
and
Hon'ble MR.JUSTICE D.A.MEHTA Sd/-

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

CADILA LABORATORIES PVT. LTD.

Versus

COMMISSIONER OF INCOME-TAX

Appearance:

1. INCOME TAX REFERENCE No. 61 of 1987
MR RK PATEL for Applicant.
MR BB NAYAK FOR MR MANISH R BHATT for Respondent.

CORAM : MR.JUSTICE A.R.DAVE
and
MR.JUSTICE D.A.MEHTA

Date of decision: 30/07/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE A.R.DAVE)

1 At the instance of the assessee, the following two questions have been referred to this Court under the provisions of Section 256(1) of the Income Tax Act,1961 by the Income Tax Appellate Tribunal, Ahmedabad Bench "A" for the opinion of this Court.

"1. Whether on the facts and in the circumstances of the case, the assessee was entitled to claim the cost of a diesel generating set as revenue expenditure ?

2. Whether on the facts and circumstances of the case the provisions of section 40A(8) were applicable in respect of interest paid to the directors and shareholders of the company ?"

2. Learned Advocate Mr.R.K.Patel has appeared for the applicant whereas learned Advocate Mr.B.B.Nayak has appeared for the respondent.

3. So far as the first question is concerned, it pertains to the nature of expenditure which the applicant assessee had incurred for the purchase of Diesel Electricity Generating Set costing Rs.2,02,273/-. Initially, while filing the return for the assessment year 1981-82, the applicant assessee did not claim cost of the said D.G.Set by way of revenue expenditure but the assessee filed revised return wherein it claimed that cost of the said D.G.Set should be deducted from the income of the assessee as the said expenditure was in the nature of revenue expenditure.

4. In the course of the assessment, the Assessing Officer rejected the claim made by the assessee because as per the Assessing Officer, the said expenditure was in the nature of capital expenditure. Being aggrieved by the assessment order, so far as it pertained to disallowance of expenditure of Rs.2,02,273/- towards cost of purchase of the D.G.Set, the assessee filed an appeal before the Commissioner of Income Tax (Appeals). After hearing the parties, the CIT (Appeals) allowed the appeal and allowed the expenditure claimed by the assessee.

5. Being aggrieved by the said order passed by the Commissioner of Income Tax (Appeals) in the appeal, the revenue filed an appeal before the Tribunal.The Tribunal,

after hearing the concerned parties, held that the expenditure incurred by the assessee for the purchase of the D.G.Set could not have been treated as revenue expenditure and thereby the appeal was allowed.

6. In the circumstances, this Court has to decide whether the assessee was entitled to claim the cost of D.G.Set as revenue expenditure.

7. We have heard learned Advocate Mr.R.K.Patel appearing for the applicant-assessee who has submitted that looking to the facts of the case, the cost incurred by the assessee for the purpose of purchasing the D.G.Set would be revenue expenditure. It has been submitted by him that the assessee is engaged in the business of manufacture of drugs. Looking to the nature of process which the assessee has to carry out, it is absolutely necessary for the assessee to have continuous supply of electricity. It has been submitted by the learned Advocate that the supply of electricity was absolutely irregular and so as to see that the entire manufacturing process is not hampered or the manufacturing activity carried out by the assessee is not adversely affected, it was absolutely necessary for the assessee to have its own standby system of electricity generation so that in case of failure of electricity supply, the assessee can have recourse to its own system of supply of electricity. Looking to the manufacturing activity in which the assessee is engaged, the assessee was constrained to purchase the D.G.Set. It has been submitted by the learned Advocate that it was not open to the assessee to generate electricity and it had to take special permission from GEB and AEC Ltd. for the purpose of purchase of the D.G.Set so as to have a system whereby it can generate electricity whenever regular supply of electricity is disconnected. He has drawn our attention to the condition on which the assessee was permitted by the abovenamed two authorities to install the D.G.Set. Our attention has been drawn to the fact that it was not open to the assessee to sell or to supply the electricity generated by the assessee to any other person. Moreover, the D.G.Set was to be used only when regular electricity supply was disrupted for any reason. In other words, he has submitted that the said D.G.Set was to be used as a standby source for supply of electricity and the said D.G.Set was not to be used in regular course for the purpose of generation of electricity.

8. Looking to the above referred facts, it has been submitted by the learned Advocate appearing for the assessee that no new asset was created on account of

purchase of the said D.G.Set because the said set was to be used only in case of failure of electricity supply. It has been submitted by him that by virtue of the purchase of the said set the operation and manufacturing activities of the assessee were to be more efficient and more profitable because in that event the assessee could have continued the process of production even after disruption of electricity supply which it used to get from GEB.

9. So as to substantiate the above referred arguments, learned Advocate has relied upon the following judgments :

[1] 225 ITR 792
Punjab State Industrial Development Corporation Ltd. vs. C.I.T.

[2] 156 CTR 374
C.I.T. Vs. Salem Textiles ltd.

[3] 124 I.T.R. 1
Empire Jute Co.Ltd. vs. C.I.T.

[4] 86 ITR 549
C.I.T. vs. Ashok Leyland Ltd.

[5] 56 ITR 52
Bombay Steam Navigation Co.Pvt.Ltd. vs. C.I.T.

[6] 127 ITR 74
Sarabhai M.Chemicals Pvt.Ltd. vs. C.I.T.

[7] 108 ITR 14
Addl.C.I.T. vs. Desai Bros.

[8] 198 ITR 535
C.I.T. vs. Tea Estate (P) Ltd.

[9] 211 ITR 496
C.I.T. vs. Jafarbhai Akbarali And Bros.

10. On the other hand, learned Advocate Mr.B.B.Nayak appearing for the revenue has strongly submitted that by virtue of purchase of the D.G.Set, a new capital asset had been purchased by the assessee which was in use for last several years. According to him, the Tribunal was justified in treating the expenditure incurred by the

assessee for purchase of the said set as capital expenditure. It has also been submitted by him that with the help of the said D.G.Set the assessee was to generate electricity and, therefore, the said set can be treated as a plant and by no stretch of imagination it can be said that the expenditure incurred by the assessee for the purchase of the said plant/machinery was revenue expenditure. He has submitted that electricity generators are normally treated as plants and depreciation and even development rebate is being granted to the assessee who purchases the plant provided all other relevant conditions are fulfilled. It has also been submitted by him that the D.G.Set is a capital asset and it would bring an enduring benefit. Moreover, the set, though it was to be used under certain circumstances, it belonged to the assessee and not to GEB or AEC Ltd. In view of the said fact, it has been submitted that the Tribunal was absolutely justified in treating the expenditure incurred by the assessee for the purpose of purchase of the D.G.Set as capital expenditure. In the course of his arguments he has relied upon the judgments delivered in the cases of Punjab State Industrial Development Corporation Ltd. vs. C.I.T., 225 ITR 792 and C.I.T. vs. Salem Textiles Ltd. 156 CTR 374.

11. We have heard the learned Advocates at length and have perused the orders passed by the Tribunal and the Commissioner of Income Tax (Appeals).

12. Upon perusal of the orders referred to hereinabove and the judgments referred to by the learned Advocates, we are of the view that the Tribunal was absolutely justified in coming to the conclusion that the expenditure incurred by the assessee for the purchase of the D.G.Set could not have been treated as revenue expenditure. In our opinion, the assessee had purchased a capital asset. Though the said asset was to to be used only in case of emergency, still it remained a capital asset and it had all essential characteristics of capital assets. We cannot dispute the proposition laid down in the judgments referred to by the learned Advocates but it is also pertinent to note that the Hon'ble Supreme Court has observed in the case of Empire Jute Co.Ltd. vs. C.I.T., 124 I.T.R. 1, that "There have been numerous decisions where this question has been debated but it is not possible to reconcile the reasons given in all of them, since each decision has turned upon some particular aspect which has been regarded as crucial and no general principle can be deduced from any decision and applied blindly to a different kind of case where the

constellation of facts may be dissimilar and other factors may be present which may give a different hue to the case". Looking to the peculiar facts of the case on hand and the observations made by the Supreme Court in the above referred judgement, one can very well come to a conclusion that the assessee had purchased a capital asset. Though the D.G.Set was to be used in a special set of circumstances, the D.G.Set would not cease to be a capital asset and it's cost would not become revenue expenditure.

13. Learned Advocate has given much stress to the judgment delivered by this High Court in the case of Addl.C.I.T. vs. Desai Bros.,108 ITR 14. The facts of the said case cannot be compared with the facts of the present case for the reason that in the case of Addl.C.I.T. vs. Desai Bros.(Supra) the assessee had repaired its vehicle, having old petrol engine. The petrol engine of the said vehicle was discarded and a new diesel engine was installed in the vehicle. The cost of the diesel engine was treated as revenue expenditure possibly because of peculiar facts of the said case. It is pertinent to note that the vehicle which the assessee was using in the said case had become very old and it required substantial repairs. Engine of the said vehicle required changes to such an effect or the cost of repairs was so much that the assessee in the said case decided to get a new diesel engine fitted in the vehicle by discarding the old petrol engine.

It is pertinent to note that the case which has been referred to hereinabove was with regard to repairs of the vehicle. In the instant case the machine has not been changed or substantially repaired but a new machine viz.D.G.Generating set has been purchased. In the instant case, we are concerned with acquisition of a new asset and we are not concerned with major repairs involving substantial replacement of a part of a machine or a vehicle and therefore the principle laid down in the case of C.I.T. vs. Jafarbhai Akbarali And Bros, 211 I.T.R.496 will not help the assessee. The said view was followed by Calcutta High Court as well as Bombay High Court but as facts of the cases referred to by the assessee are different, we need not deal with the said judgments.

14. In view of the above facts, in our opinion, we do not find any fault with the observations made and the decision arrived at by the Tribunal to the effect that the cost of D.G.Set could not have been treated as a

revenue expenditure.

15. In the circumstances, we are of the view that the Tribunal was absolutely justified in not allowing the expenditure in respect of the cost of the D.G.Set. We, therefore, answer the question referred to us in the negative i.e. in favour of the revenue and against the assessee.

16. So far as the second question is concerned, it has been fairly submitted by the learned Advocates that the said question has already been answered in the case of Agew Steel Manufacturers Pvt.Ltd. vs. C.I.T., 209 I.T.R.77. Looking to the law laid down in the said judgment, we answer the said question in the affirmative i.e. in favour of the revenue and against the assessee.

17. The Reference thus stands disposed of accordingly with no order as to costs.

Sd/- Sd/-
(A.R.Dave, J) (D.A.Mehta, J)

m.m.bhatt